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No.

In The

Supreme Court of the United States

October Term, 1983

ELBERT ERKINS, SAMUEL DENSON, and PERRY CULPEPPER, on behalf of themselves and all others similarly situated,

Petitioners,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and UNITED STEELWORKERS OF AMERICA, LOCAL 7326,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WALTER F. KELLY
(Counsel of Record)
Sutton & Kelly
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

THOMAS M. JACOBSON
Jacobson, Sodos & Krings, S.C.
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 271-2302
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether in a non-hybrid case of fraudulent behavior by union officials which breaches their duty of fair representation to their members, §10(b) NLRA's six-month statute of limitations replaces Alabama's otherwise applicable one-year fraud-tolling statute of limitations?

2. Whether in a non-hybrid case of fraudulent breach of the duty of fair representation, this Court's decision in *Del Costello v. Teamsters*, _____ U.S. _____, 103 S. Ct. 2281 (1983), should be applied retroactively to bar suit that satisfies Alabama's one-year fraud-tolling statute of limitations upon which the plaintiff relied?

3. Whether an intra-union, constitutional-contract duty of fair representations, otherwise enforceable by its beneficiary union-members under §301, LMRA, should be denied enforcement because that duty, if enforced, would be subject to Alabama's six-year contract limitations' period rather than to NLRA §10(b)'s six-month limitations' period?

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AMERICA, LOCAL 7326,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, Elbert Erkins, Samuel Denson, and Perry Culpepper, on behalf of themselves and all others similarly situated, hereby petition the United States Supreme Court to issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, enabling this Court to review the judgment in *Erkins, v. United Steelworkers of America*, 723 F. 2d 837 (11th Cir. 1984).

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama was issued on June 11, 1982, is not reported, and is reprinted as Appendix B to this Petition. The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on January 23, 1984, is reported at 723 F. 2d 837 (11th Cir. 1984), and is reprinted as Appendix A to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on January 23, 1984. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The National Labor Relations Act, 29 U.S.C. §160(b), provides in pertinent part as follows:

> "... no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge...."

Alabama Code §6-2-3 (1975) provides in pertinent part as follows:

> "In motions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact(s) constituting the fraud, after which he must have one year within which to prosecute his action."

Alabama Code §6-2-39(a) (5) (1975) provides in pertinent part as follows:

> "(a) The following must be commenced within one year:
>
> . . .
>
> "(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; . . ."

Alabama Code §6-2-34(4) and (9) (1975) provide in pertinent part as follows:

> "The following must be commenced within six years:
>
> . . .
>
> "(4) Actions founded on promises in writing not under seal;
>
> . . .
>
> "(9) Actions upon any simple contract or speciality not specifically enumerated in this section. . . ."

STATEMENT OF THE CASE[1]

Upon expiration of their collective bargaining agreement with American Buildings Co., Steelworkers struck. The strike lasted nearly two years, and NLRB decertified the union as the bargaining representative of the employees. For summary judgment purposes the district court accepted as true allegations that during the strike officers of the union embezzled funds, self dealt, misadvised the union membership on their replacement rights, failed to negotiate a reasonable successor collective bargaining agreement, and so unnecessarily prolonged the strike as to cause its failure and the membership's loss of employment. The membership learned of some of the officers' breaches December 1, 1979. The membership filed this breach of duty of fair representation class action November 24, 1980, more than six, but less than 12, months later.

The district court granted summary judgment for Steelworkers on the membership's claim and held that the fair representation claim was barred by Alabama's one-year statute of limitations for tort actions, Ala. Code §6-2-39(a) (5) (1975), and that the Constitution of Steelworkers did not impose an implied contractual duty of fair representation on Steelworkers independent of the duty implied in the National Labor Relations Act.

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[1]This Statement is based upon the facts as stated by the Court of Appeals. Attached hereto and incorporated herein by reference as Appendix C is the Plaintiffs-Petitioners' Statement of Facts in the Court of Appeals.

The Court of Appeals affirmed the district court but premised its opinion on a different analysis. It held that this action, alleging fraudulent breach of the union's duty of fair representation in a non-hybrid situation, was subject to the six-month statute of limitations established in the National Labor Relations Act and thus was barred, even though brought within one year after discovery of the alleged fraudulent breach of duty, and even though thus brought within the fraud-tolling period under Alabama limitations law. It also held that the exclusive representation provisions of the International Steelworkers Union constitution should not be construed to allow for the enforcement of a constitutional-contract duty of fair representation claim under §301, LMRA, because so to allow would be to circumvent the six-month limitations' period established by the National Labor Relations Act.

REASONS FOR GRANTING THE WRIT

This case poses three important questions respecting the development of federal labor law by this Court. The first question concerns the unwarranted extension by the Court of Appeals of this Court's decision in *Del Costello v. Teamsters*, an extension expressly prohibited by this Court in its *Del Costello* opinion. The second question involves the retroactive application of *Del Costello* to the facts of this case, a question which, in general terms, currently divides the United States Courts of Appeals. The third question involves the proper interpretation of this Court's opinion in *United Plumbers and Pipe Fitters v. Local 334*, 451 U.S. 615 (1981), as extended to beneficiary union members (a question expressly reserved by this Court in the *United Plumbers* opinion) and as related to federally borrowed, state law limitations' periods as defined and developed in *International Union, U.A., A. & A.I.W. v. Hoosier Cardinal Corporation*, 383 U.S. 696 (1966) and *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), respecting labor contract-based claims. We consider each of these matters *seriatim*. However, before doing so, we first comment upon the particularly egregious and unique nature of the facts of this case.

This is *not* a typical employment discharge or discipline hybrid fair-representation, breach-of-collective-agreement lawsuit. This is a case that involves outrageous fraudulent behavior by union officials who manipulatively prolonged a bitter strike in order to extend the period during which they could continue to steal from the strikefund. The same plaintiffs who initiated this action also initiated proceedings pursuant to §501 of the Landrum-Griffin Act for breach of fiduciary duty by those union officials. That case was dismissed on technical, procedural grounds by the same trial court that dismissed this case. See *Erkins v. Bryan*, 494 F. Supp. 732, 737 (M.D. Ala. 1980). Plaintiffs appealed that case to the United States Court of Appeals for the Eleventh Circuit, and the decision of the trial court was reversed at 663 F. 2d 1048 (11th Cir. 1981). The United Steelworkers of America sought certiorari to this Court, which was denied. 103 S. Ct. 343 (1982). The §501 case was tried on remand in January 1984; briefing occurred between January 1984 and March 1984; the decision of the trial court is presently under submission. In these circumstances, it is particularly appropriate that this Court review 663 F. 2d 1048 (11th Cir. 1981) and this Certiorari Petition closely respecting the factual gravity, moral sensitivity and legal importance of the three certiorari questions presented.

I. SECTION 10(b) HAS BEEN OVEREXTENDED.

In *Del Costello v. Teamsters*, _____ U.S. _____, 103 S. t. 2281 (1983), this Court was especially careful to limit its holding to narrow instances of hybrid fair-representation, breach-of-collective-agreement cases. The rationale for that limited holding was to foster federal labor policy with respect to the speedy resolution of regular and frequent labor dispute matters. Otherwise, this Court concluded, the typical federal borrowing rationale which refers to analogous state limitations' law, was to be retained. In our case, the Court of Appeals reached out to extend the holding in *Del Costello*. No federal

interest in the speedy resolution of typical labor disputes is presented in this case. Rather, this case involves direct fraudulent fiduciary breach which fits closely within the relevant, analogous Alabama fraud-tolling statute of limitations. Alabama Code §6-2-3 (1975). In these circumstances, this Court should grant the Petition for Certiorari in order to prevent the unwarranted extension of its prior holding in *Del Costello*.

II. *DEL COSTELLO* SHOULD NOT BE APPLIED RETROACTIVELY IN THIS CASE.

The Courts of Appeals are divided on the question of the retroactivity of the *Del Costello* decision in circumstances of the typical hybrid breach-of-duty-of-fair-representation, breach-of-collective-agreement case. Compare *Rogers v. Lockheed-Georgia Co.*, 720 F. 2d 1247 (11th Cir. 1983) with *Edwards v. Teamsters Local No. 36*, 719 F. 2d 1036 (9th Cir. 1983), and *Barina v. Gulf Trading and Transportation Co.*, _____ F. 2d _____, 115 L.R.R.M. 3086 (9th Cir. February 13, 1984). This case presents particularly poignant circumstances for the non-retroactive application of *Del Costello*, because it involves a non-hybrid case in which plaintiffs filed their action in compliance with then-existing, reasonable Alabama limitations law respecting a one-year tolling period for instances of fraudulent behavior. Alabama Code §6-2-3; §6-2-39(a) (5) (1975). See *Erkins v. United Steelworkers of America*, 723 F. 2d 837 at 838 & n. 1 (11th Cir. 1984).

III. CONSTITUTIONAL CONTRACT CLAIM

In *United Plumbers and Pipe Fitters v. Local 334*, 452 U.S. 615 (1981), this Court held cognizable under §301 of LMRA a suit by a local union against its parent international union alleging a violation of the Union Constitution. The Court at footnote 16 of its Opinion expressly reserved the question of

whether individual union members may bring suit on their union constitution against the labor organization of which they are members. The Eleventh Circuit has followed the decision in *Alexander v. International Union of Operating Engineers*, 624 F. 2d 1235 at 1238 (5th Cir. 1980) allowing for individual member suits on the union constitution. Under §301 law a direct contract-based claim, constitutional or otherwise, is subject to the limitations' principle of *International Union, U.A., A. & A.I.W. v. Hoosier Cardinal Corporation*, 383 U.S. 696 (1966), as elaborated in *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 at 64 (1981), that state labor-contract limitations' principles are controlling by federal borrowing of analogous state limitations' periods. Under Alabama law, as under Indiana law in *Hoosier Cardinal*, a six-year statute of limitations for contract violations applies. Alabama Code § §6-2-34(4) and (9) (1975); *International Brotherhood of Electrical Workers v. Powell*, 370 So. 2d 987 (Ala. 1980). Thus, for the Court of Appeals in the instant case to refuse to recognize enforcement of the constitutional-contract fair representation principle, because so to do would violate the NLRA six-month limitations' principle, is for the Court of Appeals effectively to ignore the decisions of this Court in *Hoosier Cardinal* and *Mitchell* and once again to extend *Del Costello* to a case in which it has no proper application.

CONCLUSION

The Court of Appeals rushed to an unwarranted, retroactive over-extension of the six-months' federal limitation principle set forth in *Del Costello* to a case which in every relevant respect was unsuited to that principle. In doing so, the Court of Appeals undermined prior decisions of this Court, including *Del Costello* itself, respecting the borrowing of appropriate, analogous state limitations laws in federal labor litigation. For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER F. KELLY
(Counsel of Record)
Sutton & Kelly
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

THOMAS M. JACOBSON
Jacobson, Sodos & Krings, S.C.
152 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
(414) 271-2302

Attorneys for Petitioners

APPENDIX A

Elbert ERKINS, and Samuel Denson, and Perry Culpepper, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and United Steelworkers of America, Local 7326, Defendants-Appellees.

No. 82-7217.

United States Court of Appeals,
Eleventh Circuit.

Jan. 23, 1984

Union members brought class action against union for its alleged breach of duty of fair representation in regard to misconduct of union officers during extended strike. The United States District Court for the Middle District of Alabama, Truman M. Hobbs, J., granted summary judgment in favor of union, and members appealed. The Court of Appeals, Godbold, Chief Judge, held that action alleging breach of union's duty of fair representation was subject to six-month statute of limitations established in National Labor Relations Act, and thus, member's action, brought almost 11 months after discovery of alleged fraud and breach of duty, was time barred.

Affirmed.

1. Labor Relations 777

In suit for breach of collective bargaining agreement, state contract law provides applicable limitations period.

2. Labor Relations 758

Union members' class action against union for its alleged breach of duty of fair representation was subject to six-month

statute of limitations established in National Labor Relations Act, and thus, as members admitted that they discovered facts constituting evidence of alleged fraud and breach of duty more than six months prior to bringing of suit, action was time barred. National Labor Relations Act, § 10(b), as amended, 29 U.S.C.A. § 160(b).

3. Labor Relations 219, 758

Exclusive representation provision of collective bargaining agreement did not create contractual duty of fair representation on part of union which existed independently of implied statutory duty under National Labor Relations Act, and thus, union members could not have benefit of state six-year statute of limitations for actions on contracts in their breach of duty of fair representation claim which was otherwise governed by six-month statute of limitations established by Act. National Labor Relations Act, § 10(b), as amended, 29 U.S. C.A. § 160(b); Ala.Code 1975, § 6-2-34.

Appeal from the United States District Court for the Middle District of Alabama.

Before GODBOLD, Chief Judge, and RONEY and KRAVITCH, Circuit Judges.

GODBOLD, Chief Judge:

Upon expiration of their collective bargaining agreement with American Buildings Co., Steelworkers struck. The strike lasted nearly two years, and NLRB decertified the union as the bargaining representative of the employees. For summary judgment purposes the district court accepted as true allegations that during the strike officers of the union embezzled funds, self dealt, misadvised the union membership on their replacement rights, failed to negotiate a reasonable successor collective bargaining agreement, and so unnecessarily prolonged the

strike as to cause its failure and the membership's loss of employment. The membership learned of some of the officers' breaches December 1, 1979. The membership filed this breach of duty of fair representation class action November 24, 1980, almost 11 months later.

The district court granted summary judgment for Steelworkers on the membership's claim and held that the fair representation claim was barred by Alabama's one-year statute of limitations for tort actions, Ala. Code § 6-2-39(a) (1975), and that the constitution of Steelworkers did not impose an implied contractual duty of fair representation on Steelworkers independent of the duty implied in the National Labor Relations Act. We affirm though in part on different grounds.

I. *DelCostello* and its application to this case

In *DelCostello v. International Brotherhood of Teamsters*, ____ U.S. ____, ____, 103 S.Ct. 2281, 2293, 76 L.Ed.2d 476, 492 (1983), the Supreme Court held that the six-month statute of limitations of § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1976), applied to a hybrid action combining claims of breach of duty of fair representation against a union with breach of collective bargaining agreement against an employer.[1] Steelworkers argues that this period applies to the present action involving merely a claim of breach of duty of fair representation against a union. The membership contends that the six-month limitations period applies only to hybrid actions. An action involving only a breach of duty of fair representation claim against a union, the membership argues, is governed by a six-year Alabama statute of limitations for suits on contracts, Ala. Code § 6-2-34 (1975), or a one-year Alabama statute of limitations for suits on contracts, Ala. Code § 6-2-39(a) (1975), which recognizes tolling by fraudulent conduct of the officers and renders this action timely. We hold that *DelCostello* requires application of the six-month statute of limitations of § 10(b).

[1] In *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), we applied *DelCostello* retroactively to causes of action accruing before the Supreme Court's decision in that case. *But see Edwards v. Teamsters Local No. 36*, 719 F.2d 1036 9th Cir. 1983) (refusing to apply *DelCostello* retroactively). Both *DelCostello* and *Rogers* were decided after the district court's grant of summary judgment in the present action.

The Court in *DelCostello* chose the six-month limitations period for a hybrid action because § 10(b) statute provided a "closer analogy" than available state statutes and because "federal policies at stake and the practicalities of litigation" rendered the six-month period appropriate. _____U.S. at____, 103 S.Ct. at 2294, 76 L.Ed.2d at 493. Both the similarity of the right asserted and policy considerations involved between a charge of an unfair labor practice under the NLRA (with its accompanying six-month statute) and a hybrid cause of action required application of the six-month period. *Id.* _____ U.S. at _____ _____, 103 S.Ct. at 2293-94, 76 L.Ed.2d at 492-93. This similarity of rights and considerations exists even more clearly when a claimant brings only a breach of duty of fair representation claim against a union.

First, the Court in *DelCostello* indicated that a breach of a union's duty of fair representation either was an unfair labor practice or so closely resembled an unfair labor practice as to require use of the six-month statute applicable to such claims:

> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. E.g., Miranda Fuel Co., 140 NLRB 181 (1962), enforcement denied, 326 F.2d 172 (CA2 1963). We have twice declined to decide the correctness of the Board's position, and we need not address that question today. Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap. Many fair representation claims (the one in No. 81-2386, for example) include allegations of discrimination based on membership status or dissident views, which would be unfair labor practices under § 8(a)(1) or (2). Aside from these clear cases, duty-of-fair-representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions. See generally R. Gorman, Labor Law 698-701 (1976). Similarly, it may be the case that alleged violations by an employer of a collective bargaining agreement will also amount to unfair labor practices. See id., at 729-734.

Id. In this circuit we have held that "a breach of duty of fair representation in itself constitutes an unfair labor practice within the contemplation of the National Labor Relations Act." *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers v. NLRB*, 368 F.2d 12, 17 (5th Cir.1966); *see also Abilene Sheet Metal, Inc. V. NLRB*, 619 F.2d 332, 347 (5th Cir.1980).

Second, in *DelCostello* the national policy considerations implicated in a hybrid action required application of the six-month period. This six-month period accommodated "the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system." ____U.S. at____, 103 S.Ct. at 2294, 76 L.Ed.2d at 493. The Court held that the hybrid action "unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.'" *Id.* (quoting *UAW v. Hoosier*, 383 U.S. 696, 702, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966)). Allegations, as in this case, that the union breached its duty to its membership by failing to negotiate a successor collective bargaining agreement and unnecessarily prolonging a strike necessarily implicate these "consensual processes."

[1] Third, apart from the Court's analogy in *DelCostello*, examining the two components of the hybrid claim, breach of duty of fair representation against a union and breach of collective bargaining agreement against an employer, indicates that the six-month statute applies to a fair representation claim alone. *DelCostello* distinguishes between a straightforward contract suit alleging breach of the collective bargaining agreement and a hybrid breach of collective bargaining agreement/duty of fair representation claim. In a suit for breach of the collective bargaining agreement state contract law provides the applicable limitations period. *Id.* _____ U.S. at_____, 103

S.Ct. at 2289, 76 L.Ed. 2d at 487. *DelCostello* recognized that the addition of the fair representation element makes the state period inappropriate and requires application of the six-month period under § 10(b). The addition of the fair representation element requires application of § 10(b) because "the unfair representation claim made by an employee against his union . . . is more a creature of 'labor law' as it has developed since the enactment of § 301 than it is of general contract law." *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63, 101 S. Ct. 1559, 1564, 67 L.Ed.2d 732 (1981). Thus the presence of the labor law element, not just the hybrid nature of the suit, made the application of § 10(b) appropriate in *DelCostello*.

[2] The application of § 10(b) is even more appropriate here than in *DelCostello*. In *DelCostello* the presence of the claim for breach of collective bargaining agreement, which alone would have been governed by a state statute of limitations for suit on a contract, counseled against adoption of the § 10(b) limitations period. The present action, involving only a fair representation claim, which the court in *DelCostello* held analogous to an unfair labor practice both in the right asserted and considerations involved, contains no purely contractual element militating against application of § 10(b)'s six-month period.

Section 10(b)'s six-month limitations period applies to and, therefore, bars the present action. The plaintiffs admit that they discovered facts constituting evidence of the alleged fraud and breach of duty December 1, 1979. Brief of Appellant at 26. The membership brought suit almost 11 months after the discovery.

II. An implied contractual duty of fair representation in Steelworkers' constitution

[3] Steelworkers constitution contains the following provisions:

ARTICLE XVII
Contracts

Section 1. The International Union shall be the contracting party in all collective bargaining agreements and all such agree-

ments shall be signed by the International Officers.

* * * * * * *

Section 3. The International Union and the Local Union to which the member belongs shall act exclusively as the member's agent to represent the member in the presentation, maintenance, adjustment, and settlement of all grievances and other matters relating to terms and conditions of employment or arising out of the employer-employee relationship.

From these two sections the membership argues that we can imply a contractual duty of fair representation, which would be governed by Alabama's six-year statute of limitations for actions on a contract, in addition to the statutory duty of fair representation implied under the NLRA, *see Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967) (recognizing statutory duty of fair representation implied under NLRA). The membership relies on *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202, 65 S.Ct. 226, 232, 89 L.Ed. 173 (1944), where the Court implied a duty of fair representation in the Railway Labor Act, and on the common law obligation of fairness imposed in contracts where one acts on behalf of others. *See* Restatement (Second) of Contracts § 205 (1981) (duty of good faith and fair dealing imposed in every contract).

Since the Supreme Court found an implied statutory duty of fair representation in the exclusive representation provisions of the NLRA, 29 U.S.C. § 159 (1976), *see Vaca v. Sipes*, a claim for which is barred by the six-month limitations period of § 10(b), recognizing a contractually implied duty and applying to it a state six-year statute of limitations would create an anomalous situation. Claims under the implied statutory duty would have to be brought within six months, but claims under the union constitution could be brought within six years, even though the two claims differ in name only. Many, if not all, union constitutions contain exclusive representation provisions. The six-month limitations period in § 10(b) would be rendered meaningless because fair representation claims could be brought under state statutes of limitations for contract suits, which vary from

one year to at least six years. Finding an implied contractual duty and applying a state statute of limitations many times longer than the one *DelCostello* deemed appropriate to balance the national interests in prompt resolution of labor disputes and an employee's interest in challenging the dispute resolution mechanism would defeat the Court's choice of a statute of limitations balancing those concerns. We hold that no implied contractual duty of fair representation exists independently of the implied statutory duty under the NLRA.

The district court properly held that the union constitution did not create an implied duty of fair representation separate from the implied duty found in the NLRA.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ELBERT ERKINS et all
etc

Plaintiffs

vs. CIVIL ACTION NO. 80-495-N

UNITED STEELWORKERS
OF AMERICA, AFL-CIO-
CLC, et al

Defendants

MEMORANDUM OPINION

This lawsuit arises out of an unsuccessful strike by the defendants United Steelworkers of America, AFL-CIO-CLC and its Local 7326 (hereinafter collectively referred to as "the Union") against the American Buildings Company. The Union, as the exclusive collective bargaining representative, struck the American Buildings Company's plant in Eufaula, Alabama upon the expiration of a collective bargaining agreement in December 1976. The strike lasted eighteen months and ended on July 14, 1978, when the National Labor Relations Board decertified the Union as the bargaining representative based upon a vote of the bargaining-unit employees. Plaintiffs, who were employed as production and maintenance workers at the Eufaula plant and were members of the Union, lost their jobs as a result of the unsuccessful strike.

In their complaint plaintiffs seek damages from the Union for their loss of employment and employment related injuries. Plaintiffs proceed on two different theories. Plaintiffs first claim that the Union breached its federal common law and

statutory duties of fair representation by carrying on collective bargaining negotiations in bad faith and with the deliverate design to give plaintiffs the false impression that a sincere effort was being made to settle the strike, when in fact Union officials were embezzling money from the strike fund during the period of the strike. In addition, plaintiffs allege that the Union breached its "constitutional-contractual" duties owing to the plaintiffs by engaging in the aforementioned activities during the strike. The Union has moved for summary judgment on both aspects of plaintiffs' suit.

I. The Duty of Fair Representation Claim

A union's duty of fair representation is a statutory duty grounded in and governed by federal law. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Defendant Union does not deny in its motion for summary judgment that such a duty exists, but instead argues that plaintiffs' suit is barred by the one-year limitations period for tort actions prescribed by Section 6-2-39(a) (5), *Alabama Code*.[1] Plaintiffs oppos the Union's otion by insisting that their suit is not barred by the one-year statute of limitations period for actions on a claim of a contractual nature provided by Section 6-2-34(4), Alabama Code,[2] is applicable in this case.

1. *Ala. Code Sec. 6-2-39(a) (1975) prov[illegible]les:*

"The following must be commenced within one year:

* * *

(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; . . ."

The Union alternatively contends that the six-month limitation period found in Sec. 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), is applicable. *See generally United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). The Court does not consider the Union's alternative contention since the Court finds that plaintiffs' duty of fair representation claim is barred by the longer one-year limitation period for tort actions provided by Alabama law.

2. *Ala. Code* Sec. 6-2-34 provides:

"The following must be commenced within six years:

* * * *

(4) Actions founded on promises in writing not under seal; . . ."

Since Congress did not provide a uniform federal limitations period for suits charging the breach of a union's duty of fair representation, courts are to look to the most appropriate statute of limitations provided by state law. *Cf. Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975) (limitations period for a cause of action under 42 U.S.C. § 1981 found under Tennessee law). The Union contends that the Fifth Circuit's decision in *Sanderson v. Ford Motor Col*, 483 F.2d102 (5th Cir. 1973) that the Alabama one-year statute of limitations for tort claims is applicable to fair representation actions should be followed. Plaintiffs, on the other hand, maintain that the Alabama six-year statute of limitations for contract claims must be applied in light of the Alabama Supreme Court's decision in *IBEW v. Powell*, 370 So2d 987 (Ala. 1979).

The Court is of the opinion that the one-year limitations period for tort actions provided by Section 6-2-39(a) (5), *Alabama Code*, should be applied to fair representation actions. It is an established principle that "the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law." *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966). The characterization that state law would impose is usually accepted "unless that characterization is unreasonable or otherwise inconsistent with national labor policy." *Id.* In the recent case of *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), the United States Supreme Court reiterated the federal policy favoring the "' relatively rapid disposition of labor disputes,"' *id.* at 63 (quoting *Hoosier Cardinal*, 383 U.S. at 707), in applying New York's ninety-day statute of limitations for actions to vacate arbitration awards to an unfair representation claim rather than that state's six-year statute of limitations for breach of contract actions. *See also Clayton v. UAW*, 451 U.S. 679, 693 (1981). Moreover, in *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 114 (5th Cir. 1973), the Fifth Circuit cited with approval the First Circuit's rejection of an attempt to characterize a fair representation suit as a contract action in *De Arroyo v. Sindicato De Trabajadores Packinghouse*, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) and found the

Alabama one-year statute of limitations for tort actions to be applicable. In accordance with the *Sanderson* decision and the federal policy favoring rapid disposition of labor disputes, the Court concludes that the one-year limitations period for tort actions prescribed by Section 6-2-39(a) (5), *Alabama Code*, should be applied to plaintiffs' duty of fair representation claim.

Plaintiffs' complaint was filed November 24, 1980. The Union argues that the alleged misconduct ended no later than July, 1978, when the strike was terminated and the National Labor Relations Board decertified the Union as the employees' exclusive representative. This action is, therefore, barred, according to the Union, since it was brought more than two years after plaintiffs' cause of action accrued. Plaintiffs contend, however, that this action was timely filed because the facts constituting fraud were not discovered until November 30-December 1, 1979, when checks written to former Union officials from the strike fund were disclosed, and because the Union fraudulently concealed those improper payments. The evidence now before the Court does not support plaintiffs' theory.

In *Garrett v. Raytheon Co.*, 368 So.2d516, 519 (Ala. 1979), the Alabama Supreme Court remarked that "ignorance of the injury, when there was no *fraudulent* concealment, did not postpone the running of the statute until the injury was discovered." (emphasis in original). Therefore, in order for plaintiffs to escape the bar of the one-year statute of limitations, they must affirmatively show fraudulent concealment by the Union. Under Alabama law fraudulent concealment "will toll the running of the statute of limitations until the tort or injury is discovered or could have been discovered by due diligence." *City of Godsden v. Harbin*, 398 So.2d 707, 709 (Ala.Civ.App.1981).

Plaintiffs have failed to present any relevant evidence that the Union fraudulently concealed the alleged misconduct. Plaintiffs point to a letter dated December 10, 1979, in which one of plaintiffs' attorneys requested from the Union an accounting of all monies which were in the strike trust fund during the year 1978, and a reply letter dated January 16, 1980, in

which the Union refused plaintiffs' request for an accounting, as evidence of fraudulent concealment. Such evidence—even if sufficient to raise the issue of fraudulent concealment—would certainly not toll the running of the one-year statute of limitations since the limitations period would have expired over five months prior to plaintiffs' request for an accounting.

To the contrary, the evidence now before the Court indicates that the plaintiffs had some knowledge of the alleged breach of the duty of fair representation shortly after the strike ended in July 1978. In affidavits submitted in opposition to the motion for summary judgment, plaintiffs admit that after the strike ended they became suspicious when the Union officers began to accumulate personal property and refused to attend meetings held by former Union members to find out why the strike was unsuccessful. Indeed, plaintiffs have submitted a letter dated November 1, 1979, in which one of plaintiffs' attorneys advised the Union that he represents former employees at the Eufaula plant and stated: "It is the contention of our clients that the Union officials who handled the negotiations failed in their duty to provide them with fair representation." That letter persuades the Court that any fraudulent concealment that may have occurred in this case would not toll the running of the statute of limitations past November 1, 1979, since plaintiffs had obviously discovered and presented to their attorneys sufficient evidence of the alleged breach of the duty of fair representation for the attorneys to advise the Union of this contention. *See id.* Although palintiffs may not have realized the full extent of the alleged misconduct until the checks written to former Union officials from the strike fund were disclosed November 30-December 1, 1979, the statute would have run from November 1, 1979, at the latest, regardless whether the full amount of damages was apparent at that time. *See Home Ins. Co. v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 608, 285 So.2d 468, 473 (1973); *Moore v. United States Pipe & Foundry Co.*, 384 So.2d 1108, 1110 (Ala. Civ.App. 1980). Since plaintiffs' complaint was not filed until November 24, 1980, the Court finds that plaintiffs' duty of fair representation claim is barred by the one-year statute of limitations. Consequently, the Union is entitled to summary judgment on plaintiffs' duty of fair representation claim.

II. Plaintiffs' "Union Constitution" Claim

In addition to their duty of fair representation claim, plaintiffs also allege that the Union breached a constitutional-contractual duty of fair representation with respect to the negotiations with and strike against the American Buildings Company. Plaintiffs maintain that they may bring suit on the Union constitution under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a). Although the question whether individual union members may bring suit on a union constitution against a labor organization was recently left undecided by the Supreme Court in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry v. Local 334*, 452 U.S. 615, 627 n. 16 (1981), the Fifth Circuit has held that individual union members may bring suit on a union constitution under Section 301(a). *See Alexander v. International Union of Operating Engineers*, 624 F.2d 1235, 1238 (5th Cir. 1980).[3] *See also Doby v. Safeway Stores, Inc.*, 523 F.Supp. 1162, 1165-1166 (E.D.Va. 1981). Consequently, the Court finds that Section 301(a) provides a jurisdictional basis for plaintiffs' "Union constitution" claim.

In its motion for summary judgment the Union maintains that a duty of fair representation may not reasonably be implied from the language of the Union's constitution. The Union has submitted the declaration of its Director of the By-Laws and Elections Department, who states that the plaintiffs' conten-

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3. The portion of the fifth Circuit's decision in *Alexander* that the alleged violation of the union constitution "must create a threat to industrial peace or have a significant impact upon labor-employer relations" to confer jurisdiction under Section 301, 624 F.2d at 1238, is questionable in light of the Supreme Court's remark in *Plumbers and Pipefitters* that "adoption of the 'significant impact' test urged by the [Third Circuit] Court of Appeals would engage the federal courts in the sort of ad hoc judgments on the jurisdictional sufficiency of the pleadings that the unfettered language of § 301(a) belies." 452 U.S. at 625 n.10.

tion that Article XVII, Sections 1[4] and 3[5] of the Union constitution impose a duty of fair representation is not in accordance with the interpretation of those sections that the Union places upon them. The Union official further remarks that, to the best of his knowledge and the knowledge of others he has consulted, no one has previously contended that any sections of the Union constitution, which was adopted in 1946, impose a duty of fair representation.

This Court is reluctant to substitute its judgment for that of a Union official in the interpretation of the Union's constitution. *See Vestal v. Hoffa*, 451 F.2d 706, 709 (6th. Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). Nonetheless, the Court is bound to undertake an independent evaluation when the Union official's interpretation of the Union constitution could possibly be used to shield the alleged misconduct complained of. *Cf. Morrissey v. Curran*, 650 F.2d 1267, 1273-1274 (2nd Cir. 1981) (authorization of officers' actions "cannot be used to shield the very acts that prompted the legislation, misappropriation and abuse of union funds by officers for their personal benefit.")

Upon reivewing the relevant provisions of the Union constitution, however, the Court is persuaded that a duty of fair representation should not be implied from the constitutional language. The most pertinent constitutional provision, Article XVII, Section 3, prescribes only that the International Union and the Local Union are to be the exclusive representatives of the Union members in all employment-related matters. Although it is well established that a union which serves as the exclusive bargaining representative owes its members a statutory duty of fair representation, *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), it does not necessarily follow that the same duty may also be implied from a union's constitution. The only

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4. Article XVII, Section 1, provides:
"The International Union shall be the contracting party in all collective bargaining agreements and all such agreements shall be signed by the International Officers."

5. Article XVII, Section 3, provides:
"The International Union and the Local Union to which the member belongs shall act exclusively as the member's agent to represent the member in the presentation, maintenance, adjustment, and settlement of all grievances and other matters relating to terms and conditions of employment or arising out of the employer-employee relationship."

purpose that would be served by implying a duty of fair representation from the Union's constitution when that duty has already been statutorily created is to allow plaintiffs to characterize this aspect of their suit as a contract claim and thereby avail themselves of the six-year statute of limitations provided by Section 6-2-34(4), *Alabama Code*, rather than the one-year limitations period for tort actions provided by Section 6-2-39(a)(5), *Alabama Code*. Such ingenuity would seem to serve only to defeat the federal policy recently alluded to by the Supreme Court of favoring the rapid disposition of labor disputes. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981). *See also Clayton v. UAW*, 451 U.S. 679, 693 (1981). For this Court to now find that a "contractual" duty of fair representation may be implied from a union constitutional provision that is surely found in the overwhelming majority of union constitutions would frustrate an important federal policy. Therefore, the Court finds that the Union is entitled to summary judgment on plaintiffs' "Union constitution" claim since a duty of fair representation is not implied in the Union constitution.

Finding that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law, *Heller v. Namer*, 666 F.2d 905, 912 (5th Cir. 1982), the Court grants the Union's motions for summary judgment. An order will be entered in accordance with this memorandum opinion.

DONE this 11th day of June, 1982.

Truman Hobbs
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATEMENT OF THE CASE

I. Statement Of The Facts

Elbert Erkins, Samuel Denson, and Perry Culpepper, the plaintiffs-appellants, are rank and file members[1] of the defendant-appellee, United Steelworkers of America (hereinafter "the Steelworkers") and of its affiliated local union, Local 7326, of Eufaula, Alabama. They represent themselves and some hundred other union members of the Steelworkers and Local 7326, all of whom were employed at American Buildings Company of Eufaula, Alabama. Upon the expiration in December 1976 of its collective bargaining agreement with American Buildings Company, the Steelworkers struck the company. the strike was bitter and lasted until July 1978, when the N.L.R.B. decertified the union as the bargaining representative of the employees of the company.[2]

Billy Bryan, Arthur Comer, George Bullard, and Charlie Greene are members of the Steelworkers who were officers of Local 7326 during the strike. They worked under the direction of William Caldwell and often side-by-side with him during the strike. Mr. Caldwell was a staff representative of Region 36 of the Steelworkers, and his behavior, as those of union officials Bryan, Comer, Bullard, and Greene, is the behavior of the Steelworkers.[3]

During the strike, unbeknownst to the membership of the union, Bryan, Comer, Bullard, and Greene embezzled funds from the union strike fund and otherwise self-dealt with union

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[1]See *Erkins et al. v. Bryan et al.*, 663 F. 2d 1048 (11th Cir. 1981). This statement of facts is based substantially on undisputed record facts. Where there is any question of dispute as to any fact, this Brief will include direct record citations.

[2]In accordance with law and practice, employees who replaced the strikers voted but employees out on strike did not vote in the decertification election.

[3]Stipulation, R. 170; Compalint¶ ¶ 4, 5, & 6, R. 2-3.

funds for their own personal benefit. In order to increase the gain to themselves, these officials misadvised the union membership respecting their replacement rights as strikers, failed to negotiate a reasonable successor collective bargaining agreement, and so unnecessarily prolonged the strike as to cause its failure and the membership's loss of employment.[4]

During the course of the strike, no detailed accounting of strike expenditures was made to the union membership by Bryan, Comer, Bullard, Greene, or Caldwell; the membership was not invited to inspect the books; indeed, no mention of the books was made;[5] and there was no unusual appearance of sudden gain by any of the officers. When the strike was lost, there was speculation in the union membership and amongst the plaintiffs-appellants and others that the union had been bought off. This speculation was based on the facts that some of the union's members had been told by employer representatives that the union was going to lose the strike, that the employer and other people in Eufaula seemed to know things were going to happen to the union and its members before they actually did in fact happen, and that what had been a strong strike by a strong union had not prevailed. There was talk of and speculation about a company-union deal and a company pay-off of union officials.[6] Following decertification in July 1978, the speculation escalated due to the fact that union officers made purchases of expensive vehicles and equipment at a time when all the former employees were tight on money due to the prolonged strike and loss of employment.[7] However, because plaintiffs-appellants and others had nothing concrete to evidence their speculation, and because there then were competing,

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[4]Complaint, ¶ 12, R. 4-5. These allegations of the complaint were deemed true for purposes of the proceedings below. In August, 1981, Thomas Jacobson inspected records that revealed just how extensive the alleged misappropriation was. 331-38 & Exs. A to H.

[5]R. 205-08 at ¶ ¶ 6-10, Declaration of William Caldwell. R. 227-28 at ¶ ¶ 4-5, Aff. of Elbert Erkins; R. 232-33 at ¶ ¶ 4-5, Aff. of Samuel Denson; R. 237-38 at ¶ ¶ 4-5, Aff. of Perry Culpepper.

[6]By entry of July 15, 1981, depositions and exhibits were filed separately. References herein are to the deponent by name and the transcript by page number. Denson, 27-46, 53-57, 68-70, 78. Culpepper, 13-20. Erkins, 13-17.

[7]R. 228, ¶ 6, Aff. of Elbert Erkins; R. 233, ¶ 6, Aff. of Samuel Denson; R. 238, ¶ 6, Aff. of Perry Culpepper. Denson, 32-46. Culpepper, 16-20. Erkins, 14-17.

seemingly legitimate, explanations for these appearances,[8] plaintiffs-apellants decided to seek legal assistance to find out the truth of what happened. They checked out various lawyers and the N.L.R.B. and finally determined to seek counsel outside of Alabama. On October 31, 1979, they retained Thomas M. Jacobson of the law firm of Jacobson, Sodos, & Krings, S.C., to assist them in the pursuit of their inquiries.[9]

On November 1, 1979, Mr. Jacobson and his firm immediately commenced pursuit of the union members' inquiry by written contact with the Steelworkers. The entire course of response by the Steelworkers to these inquiries has been to resist by every means the plaintiffs' search for the truth. This led to the litigation, commenced on May 1, 1980, in *Erkins et al. v. Bryan et al.*, 663 F. 2d 1048 (11th Cir. 1981), cert. pending, No. 82-270, United States Supreme Court. The briefs in that litigation and certain parts of its record are included in a supplement to this record.[10]

That information evidences the good faith efforts of the plaintiffs-apellants to obtain the truth and an accounting; it also evidences a bad faith cover-up of the full facts respecting the behavior of Bryan, Comer, Bullard, and Greene, which continues up to this very day and is orchestrated by the Steelworkers.

Walter Ward had been the treasurer of Local 7326 until he resigned to be replaced by Charlie Greene. His wife, Sandra Ward, received and opened cancelled checks for the strike

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[8]Culpepper, 17-20. Erkins, 16-17. Denson, 35.

[9]R. 228, ¶ 7, Aff. of Elbert Erkins; R. 233, ¶ 7, Aff. of Samuel Denson; R. 238, ¶ 7, Aff. of Perry Culpepper.

[10]Plaintiffs-appellants' Motion to Supplement the Record, Exs. O & P. R. 242-330. The cited portions of the record and supplemental record contain the correspondence of November 1, 1979, to March 12, 1980, between the Steelworkers and Mr. Jacobson at Exs. D-P, R. 242-64, and the briefs on appeal in the §501 case. Ex. Q, R. 265-330; Exs. O & P, Supp. Rec.

period April 15, 1978, to May 15, 1978, which had been mistakenly sent to the Ward home by the local bank in Eufaula which was the strike fund depository. She wrote down the information and returned the cancelled checks. On the evening of November 30 and the early morning of December 1, 1979, Sandra Ward revealed that information for the first time to plaintiffs-appellants and Mr. Jacobson. This information provided some factual basis for continued membership pursuit of the truth from the Steelworkers and for litigation in the federal courts.

II. Course Of Proceedings And Disposition Below

On November 24, 1980, this fair representation lawsuit was commenced by plaintiffs-appellants.[11] The case was assigned to Judge Truman Hobbs due to the fact that the Steelworkers requested the assignment of Judge Hobbs by virtue of Judge Hobb's prior assignment in the §501(b) Landrum-Griffin case.[12]

Plaintiffs asserted three claims: a federal legally imposed fair representation breach; a federal constitutional contract breach based on the Steelworkers' Constitution; and a state constitutional contract breach based on the Steelworkers' Constitution. The Steelworkers moved for dismissal of the federal fair representation claim on the basis of the statute of limitations and for summary judgment on the federal and state constitutional claims on the basis of a Union affidavit that the Union Constitituion was not reasonably susceptible of an interpretation of honesty or good faith as to its exclusive representation provisions. The issues were briefed.[13] On April 21, 1981, the Steelworkers filed a supplemental letter brief on the issue of the application of the United State Supreme Court's *Mitchell* decision to the facts of this case, and on May 1, 1981, the plaintiffs filed their supplemental letter reply.[14] On May 18,

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[11]R. 1.
[12]Supp. Rec., Ex. A.
[13]R. 85 ff., 137 ff.
[14]Supp. Rec., Exs. B, C, & D.

1981, following a phone conference call of May 12, 1981, the Steelworkers announced their intention to move for summary judgment on the issue of the tolling or non-accrual of the statute of limitations. On May 22, 1981, the trial court denied the Steelworkers' motion for dismissal without prejudice to their right to present the same defense in their summary judgment motion.[15]

Plaintiffs moved to conduct discovery, and the Steelworkers sought a protective order.[16] The matter was resolved by phone conference, and on June 24 and 25, 1981, depositions were conducted of the local bank President, Hugh Sparks, the plaintiffs, union officers Bryan, Comer, Bullard, and Greene, and union staff representative William Caldwell.[17]

On July 28, 1981, the Steelworkers moved for summary judgment on the statute of limitations issue and filed its supporting brief.[18] On August 10, 1981, the plaintiffs opposed by way of affidavits, exhibits, and brief.[19] On August 27, 1981, the plaintiffs filed a further detailed affidavit opposing summary judgment on the basis of checks and records examined at the Atlanta office of the Labor-Management Services Administration of the United States Department of Labor.[20]

On September 8, 1981, the Court stayed civil proceedings until the completion of criminal proceedings against Bryan, Comer, Bullard, and Greene were acquitted of the charges against them.

On March 15, 1982, the Steelworkers filed a reply memorandum on the summary judgment issue of the statute of limitations and the constitutional contract claims, as well as a

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[15]R. 172.
[16]R. 173-80; R. 181.
[17]See note 6, *supra*.
[18]R. 188, 190 ff.
[19]R. 214 ff.; 331ff.
[20]R. 331 ff.
[21]R. 392.
[22]R. 393 ff.

supplemental affidavit of William Caldwell.[22] Plaintiffs responded on April 9, 1982,[23] enclosing a copy of the Eleventh Circuit's decision in the §501(b) Landrum-Griffin case, *Erkins v. Bryan*, 663 F. 2d 1048 (11th Cir. 1981).[24] On June 4, 1982, the Steelworkers filed a further letter brief.[25]

On June 11, 1982, Judge Hobbs granted summary judgment on all claims by Memorandum Opinion, and an Order was accordingly entered.[26] On July 1, 1982, the plaintiffs-appellants filed their Notice of Appeal.[27]

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[22]R. 393 ff.
[23]R. 440-43.
[24]R. 444 ff.
[25] Supp. Rec., Exs. M & N.
[26]R. 451-59; 460.
[27]R. 461.

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